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HAROLD B. WILLE

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 279

WALTER J. SAWYER, *Petitioner,*

v.

STATE OF WISCONSIN, *Respondent.*

PETITION FOR REHEARING

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No. 379

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v.

State of Wisconsin, *Respondent*.

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Walter J. Sawyer, by his attorneys, files this his petition for rehearing on the grounds that intervening circumstances of substantial or controlling effect have occurred since the original petition was filed, and there are other and substantial grounds to the petitioner not fully presented previously.

JURISDICTION

Rule 58, paragraph 2, of the Supreme Court of the United States authorizes the filing of a petition for rehearing from

an order denying a petition for writ of certiorari if filed within twenty-five days after the order of denial. This petition is timely filed under that rule.

BRIEF STATEMENT OF GROUNDS

Grounds, as required by Rule 38, exist, namely: (1) intervening circumstances of substantial or controlling effect material which warrant a reconsideration by the Court; and (2) other substantial grounds and grounds previously available to the petitioner, though presented in part because of the manner in which they were handled in the brief in opposition to the petition filed by the respondent, have not actually been properly and fully presented to this Honorable Court.

1. *Intervening circumstances of substantial or controlling effect have occurred which should be considered by this Court.* Respondent violated the rules of this Court in the manner in which it prepared and filed its brief in opposition. Rule 41(1) requires that factual statements set forth in any brief have references to the places in the record where the matters appear. Respondent urges that there is no Federal question of denial of a speedy trial involved in this case and states petitioner withdrew his motion to dismiss the indictment for lack of speedy trial by waiver, abandoned his formal request for an immediate trial and entered into an agreement that there was to be no trial of his case until after the decision on the validity of the grand jury was determined by the Supreme Court of Wisconsin in *State v. Evans*. If correct, if the record supported these statements there would be no Federal question before this Honorable Court. Respondent's brief in opposition was received on September 25, 1964. Because of the gravity of these statements petitioner's attorneys have again examined the record in this case to determine whether the record supports respondent's contentions. We find nothing in the record to support the respondent's assertions. The record

is devoid of any waiver of petitioner Sawyer's constitutional rights and the clarification of this serious situation presents such intervening circumstances of substantial and controlling effect to warrant a rehearing and a reconsideration of this Honorable Court's order. In the petition for writ of certiorari, petitioner pointed out (p. 2) that a Federal question was involved because he was indicted on April 25, 1950, but was not brought to trial until April 13, 1952, nearly two years later, and this raises the question of whether or not he was entitled to have his motion to dismiss the indictment granted upon the ground that he was deprived of his constitutional rights to a speedy trial. In petitioner's statement of the case it was pointed out that petitioner was indicted for bribery on April 25, 1950 (p. 1, R. 108). It was pointed out in the petition that in the amended motion to dismiss the petitioner, the dismissal of the indictment was urged on February 20, 1952, because a delay of almost a year had occurred, and defendant, therefore, was denied a speedy trial as required by the provisions of the Federal and Wisconsin Constitutions (R. 114).

Thereafter the petitioner, in compliance with the rules of this Court (Rules 22 and 40(1)), in support of every allegation of fact contained in the statement of the case in the petition (pp. 1-11), referred to the portions of the record bearing out each factual statement. These factual statements showed that Evans, an alderman of the city of Milwaukee, who was supposed to have been bribed, had furnished every evidence clearing petitioner and made numerous statements to responsible officials investigating these bribery charges that petitioner was not guilty of bribing him. Petitioner also pointed out that Evans was indicted on other bribery charges, convicted and jailed. While in jail an agreement was arrived at which is now admitted in the brief in opposition filed by the State (p. 4). Then Evans turned State's evidence, testified under oath, and under the accepted arrangements with the State, he

was entitled to immunity thereafter. The details of this agreement we will discuss later in this petition (p. 6, 7).

As we pointed out, petitioner's motion to dismiss was denied on April 6, 1951 (R. 35). On June 5, 1951, petitioner filed a request for an immediate trial and offered to waive a trial by jury in order to expedite the matter (R. 2). The respondent's brief admits this, but states it should not be considered affirmative action and should be brushed aside as a demand for a trial (R. 12). On the retrial which was ordered by the Supreme Court of Wisconsin, petitioner again renewed his motion to dismiss the indictment because of the denial to him of a speedy trial (R. 7). In our petition we also pointed out that petitioner never acquiesced in the delay of a trial and never entered into any agreement to delay that trial (p. 15). We are well aware of the principle that a right guaranteed to an accused in a criminal trial may be waived. Respondent has urged this principle as its basic opposition to the granting of the petition. Thus the respondent nowhere in its brief of opposition denies that petitioner under the Constitution of Wisconsin and the United States was entitled to a speedy trial as a part of due process of law. The questions presented, as restated in the brief of opposition by the respondent, clearly show that the respondent recognizes that an accused is guaranteed a right to a speedy trial, and the question presented in this case was whether he was denied a speedy trial. How does the respondent seek to avoid the delay which occurred, which the Supreme Court of Wisconsin in its first opinion clearly admitted? (262 Wis. 258.) If the petitioner were not responsible for the delay he has been denied his constitutional right of a speedy trial. Respondent argues that:

(1) The motion to dismiss because of a denial of a speedy trial was abandoned. (Br. 1)

(2) While on May 5, 1951, the case was continued for trial until June 5, 1951, this trial did not occur because

"by agreement * * * no further trials should be had until the issues relating to the validity of the Grand Jury had been determined by the Supreme Court." (Br. 11)

(3) After *State* v. *Kramer* was decided on December 4, 1951, the record was returned to the Municipal Court and the case was set for trial on April 15, 1952. (Br. 11)

If the statements contained in the respondent's brief were true and the petitioner withdrew his motion to dismiss the indictment for lack of a speedy trial, abandoned his formal request for an immediate trial which had been filed in an open court and entered into an agreement that there was to be no trial of his case until after the decision in *State* v. *Kramer*, of course, the Federal question of whether petitioner was denied a speedy trial would not be before this Honorable Court.

Rule 41(a) of this Court requires that factual statements set forth in any brief filed with this Honorable Court have references to the places in the record where the matters appear in order to show how the Federal question involved in the case was raised and disposed of. The assertions in respondent's brief that (1) petitioner abandoned his motion to dismiss on the ground that he had been denied a speedy trial (Br. 10), (2) that petitioner entered into an agreement with the respondent that there would be no further trial in his case until the issue relating to the validity of the Grand Jury had been determined by the Supreme Court in *State* v. *Kramer* (Br. 11), and that (3) there was an affirmative action on the part of petitioner to obtain an early trial (Br. 11) appear nowhere in the the record. We have searched the record filed with this Court of the proceedings concerning the first trial of petitioner, *Sawyer* v. *State*, October Term, 1951, No. 167, and we find no abandonment of petitioner's motion to dismiss, no agreement to continue the trial until after the decision in *Kramer* v. *State*, but on the contrary that record shows the petitioner took affirmative action and requested an immediate trial, even waiving trial by jury in an effort to

secure that trial. No record references are given in the brief of the respondent which support the statements relied upon by respondent, and we assert that no record references can be given which support them, the reason being petitioner never waived his motion to dismiss, reasserted it at the commencement of the trial (R. 7), and had filed a request for an immediate trial (R. 2).

Petitioner did all he was required to do, because under Wisconsin law (Wisc. Stats. Sec. 356.06; Sec. 2509 of the Municipal Court Act) the case was required to be called for trial within thirty days, even after an affidavit of prejudice is filed. While respondent asserts that a thirty-day delay was caused because petitioner wanted to employ additional counsel, it does not appear in the record. No record citation is given by respondent to support this allegation, but respondent does admit that the case was set for trial on June 5, 1951 (Br. 11). Respondent then realizing that the case was not tried until April 15, 1952, in violation of Wisconsin law which required it to be tried on June 5, 1951, asserts that an agreement was entered into but that no further trial shall be had until after the Supreme Court of Wisconsin decided *State* v. *Krause*. We specifically call the attention of this Honorable Court to the fact that the brief of respondent (Br. 11) does not state that Sawyer entered into this agreement. We deny that he did, and no such agreement appears in the record in this case.

It may well be that the respondent and counsel for Krause in the many other indictments which were pending against him for other bribes entered into this agreement and the respondent is using such an agreement as an excuse for not having afforded petitioner Sawyer a speedy trial, the request for which was filed on June 5, 1951 (R. 2). No continuance was requested by petitioner on June 5, 1951, no such agreement now urged by respondent appears of record. We have examined the brief filed by the respondent with the court below in petitioner's case and the

same misleading statements were there made and that is the basis for the erroneous ruling of the Court below that Sawyer "acquiesced in such delay as there was." But we can well understand, in view of similar statements that appear in the brief which respondent filed in the Supreme Court of Wisconsin, that that Court could have been misled on the factual situation just as this Court must have been misled by the statements which appear in respondent's brief in opposition. The record in this case is devoid of any evidence of any such agreement as described on page 11 of respondent's brief because there was no such agreement. Printed in the Appendix to this Petition are two affidavits of counsel for petitioner which support our contentions that petitioner took no actions to delay his trial.

The reason for the respondent wanting the trial to be delayed and why it has used all means within its power to keep this case from coming to trial is because until April of 1952 it had been unable to obtain and accept, as the respondent puts it, the agreement of Krause to turn State's evidence and rebut his prior sworn statements clearing Sawyer in exchange for immunity, not only in the Sawyer case but on four other charges of bribery which were awaiting trial (R. 288; App. 193-194). Respondent's statement (Br. 5-6) that our charge that "the State made a 'deal' with Krause" is pure supposition and surmise is completely inaccurate and without any support in the record. In fact, two disinterested witnesses testified to the making of this deal with Krause while he was in the state prison; and respondent (Br. 4) in order to make another argument in effect admits the existence of "such a deal" when it says: "Just before the case was set for trial, Krause offered to turn State's evidence. His offer was accepted * * *. When his offer was accepted by the State, he was entitled to immunity * * *. The disposition of other cases pending against Krause subsequent to petitioner's trial were all submitted to the proper court * * *." Thus respondent went far beyond giving Krause immunity on the Sawyer charges and made other "deals"

with Krause. As a result on the recommendation of the respondent, four remainingbribery charges against Krause were handled in such a way as to give Krause parole.

Two disinterested witnesses, in describing this arrangement which Krause told them he had made with the respondent, testified that Krause stated that he made a "good deal" while in Milwaukee and that it was necessary for him to change his story in order o get a parole and he had done so to aid his wife (R. 595,596, 605, 610). As Krause had furnished a sworn affidavit denying the bribery charges made against petitioner when he testified to the contrary at the trial of petitioner, he was guilty of perjury in either making the affidavit or in testifying against petitioner. In view of the testimony from the guard and the nurse at the prison, it is more probable that he perjured himself to convict petitioner in exchange for his freedom and to aid his wife. We submit thatthe respondent delayed the trial of Sawyer until Krause was at the respondent's mercy, was convicted, incarcerated, needed to aid his wife and had six counts, including the two Sawyer counts, pending against him which would preclude his obtaining parole. Probably if he had been convicted under all of these charges respondent could have imprisoned him for the rest of his life.

We think this situation presents intervening circumstances arising since the filing of the petition. *In Re Disbarment of Isserman*, Abraham J., No. 5, Misc., 1952 Term, decided October 14, 1954. In the *Isserman* case this Honorable Court reconsidered a disbarment order against Isserman when it was pointed out that a rule of the Court concerning disbarment had not been fully complied with and this Court, on such intervening circumstances, granted the petition of Isserman for rehearing and vacated his order of disbarment.

II. *Other substantial grounds available to petitioner have not been thoroughly presented to this Court in the previous petition which warrant a rehearing.* In the petition it was

pointed out that due process of law requires, before an accused can be convicted of a crime where the prosecution relies for a conviction upon the testimony of an admitted accomplice, that credible, corroborating evidence is necessary to support a verdict. In fact, respondent admits (Br. 15) that it is well established that the testimony of an accomplice should be corroborated. Respondent then makes the curious argument that this Court will only grant certiorari in criminal cases when it is confronted with a "shocking" violation of personal rights guaranteed under the Federal Constitution (Br. 15). We never understood that if a constitutional right is denied that the denial must in some way involve personal shock before this Court will review the denial of a right under the Federal Constitution. Thus there was nothing shocking about not admitting colored persons to sit on juries in Virginia, yet this Court thought that the right to a fair trial was of sufficient importance to correct that situation and decided that colored persons had a right to sit on juries in Virginia (Ex Parte Va., 100 U.S. 339). While the *Screws*[1] and *Williams*[2] cases did involve violations of personal rights involving physical violence, there was nothing "shocking" in the situation which occured in *Rochin* v. *California*, 342 U.S. 165, in the sense that the defendant was physically assaulted or mistreated. Without his consent he was given an emetic which resulted to his injury in the prosecution obtaining the needed capsules of morphine which were necessary for conviction. This Court felt that the use of the emetic was in the nature of an involuntary confession and stated that the conviction was obtained in violation of due process of law and would not be permitted to stand.

In its statement of the case, which is not supported by any record references, as we have pointed out before, respondent refers to our statement that the two checks of

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[1] 1. 325 U.S. 91.
[2] 2. 341 U.S. 97.

petitioner for $1500 each, the proceeds of which were never connected up with Krause or the criminal charge, and our discussion of the books kept by the State witness Powell (R. 548), would in no way aid the testimony of Krause. Respondent brushes aside our contentions and states that the two checks and the "false" entries of Powell furnish the necessary corroboration. Respondent uses the same method in disposing of our version of the testimony with appropriate record references, by making the bald statement that the checks unconnected with Krause by any evidence should be received in evidence and Powell's entries in the books were false; hence the direct testimony of the accomplice was amply supported by credible corroboration and cicumstantial evidence (Br. 15). We feel this method of mistreating the factual situation is misleading and misled this Honorable Court. We pointed out that the checks of petitioner were first received upon the promise of the respondent that they would be connected up. This was never done. Respondent does not point to any evidence which supports the admission in evidence of the disputed checks. The reason no such evidence is referred to in respondent's brief is because none exists. Insofar as the entries made by the State's witness Powell and the books of petitioner are concerned, those entries were fully explained and no testimony is referred to by the respondents showing that the entries were "false." The characterization of the respondent and the court below of these entries as "false" is without foundation in the record. No other corroboration or circumstantial evidence of any kind is referred to in respondent's brief, and again we say this situation, together with the failure of the trial judge to instruct the jury as to the effect of circumstantial evidence, denied petitioner a fair trial as guaranteed him by the Fourteenth Amendment. As a further argument, *the respondent states that because we have not shown in our petition that petitioner was innocent of the crime charged, even though he was denied a fair trial as*

guaranteed by the Constitution, that this Court should not grant certiorari because there has been no miscarriage of justice. Petitioner has always maintained his innocence, contends he has been unjustly convicted and has been denied his constitutional right to a speedy and to a fair and impartial trial. In *Tumey* v. *Ohio*, 273 U.S. 510, 535, this Court held that it makes no difference what the evidence is or how overwhelming the evidence of guilt may be, and it makes no difference even after conviction if a minimum sentence was imposed if the citizen has been denied the constitutional right to a fair trial to which he is entitled, the proceedings are void and he is entitled to have them set aside. And see *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34, Footnote 1.

CONCLUSION

WHEREFORE, it is respectfully prayed that this petition for rehearing be granted, and that this Honorable Court grant a Writ of Certiorari and bring before this Court the decision and judgment of the Supreme Court of the State of Wisconsin.

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Of Counsel:

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Certificate

Counsel for petitioner certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Warren E. Magee
Delmar W. Holloman
Counsel for Petitioner

APPENDIX

STATE OF WISCONSIN : MUNICIPAL COURT : MILWAUKEE COUNTY

Case No. E-587

STATE OF WISCONSIN, *Plaintiff*

vs.

WALTER J. SAWYER, *Defendant*

State of Wisconsin } ss
Milwaukee County }

Charles Geisenfeld, being first duly sworn, on oath deposes and states that he is an attorney at law duly licensed to practice his profession in the courts of the State of Wisconsin, as well as the Supreme Court of the United States; that on April 25, 1950, he was retained as attorney to represent Walter J. Sawyer in the above entitled case; that Walter J. Sawyer was arrested under date of April 26, 1950; the defendant was admitted to bail upon payment of $5000.00; under date of March 1, 1951, affiant, upon behalf of defendant, filed a motion to dismiss the indictment returned by the Grand Jury in the above matter against the defendant, basing said motion upon various grounds, including violation of constitutional rights of the defendant both under the State and Federal Constitutions with respect to a speedy trial; that a hearing was had upon said motion under date of March 20, 1951; that an order was duly made and entered dismissing said motion under date of April 20, 1951; that under date of May 5, 1951, the defendant was arraigned and pleaded not guilty; that an interval of more than a year elapsed from the date of the arrest, to-wit, April 26, 1950 to May 5, 1951, the date of his arraignment; that on May 5, 1951, the defendant was also represented by Leo E. Vandeuril, Esquire, as associate counsel; that on May 5, 1951, the court was duly notified that the defendant was

ready for trial; that the Special Prosecutor representing the State in the above matter, stated at that time he was not ready for trial; that thereupon the matter was adjourned at the request of the Special Prosecutor to June 5, 1951; that on June 5, 1951, the defendant filed in writing a waiver of jury trial together with consent for an immediate trial; that the above entitled case did not come on for trial until April 15, 1952; that the defendant at no time made any request for continuance or adjournment in the matter.

[redacted]

Subscribed and sworn to before me this 25th day of October 1954

[redacted]

Notary Public, Milwaukee County, Wisconsin
My commission expires: Nov. 6, 1955

(Seal)

[illegible]

Case No. [illegible]

[illegible], Plaintiff

vs.

[illegible], Defendant

State of Wisconsin)
Kenosha County) ss

Lee R. Vandervelt, being first duly sworn, on oath deposes and states that on or about June 1, 1993, and prior thereto, he was retained to represent Walter J. Sawyer as his attorney in connection with representing the said Walter J. Sawyer in the above entitled case; that on or about June 8th, 1993, and prior thereto, he had been associated with Charles Schmidtke, Esquire, as associate counsel; that on or about that 8th, 1993, the defendant in the above entitled case was called for arraignment, and at that time your affiant announced that the defendant was ready for trial; that the Special Prosecutor representing the State in the above entitled case stated that at that time he was not ready for trial; thereupon the matter was adjourned at the request of the Special Prosecutor to June 9th, 1993; that on June 9th, 1993, the defendant filed in writing a waiver of jury trial together with request for an immediate trial; that the above entitled case did not come on for trial until April 14th, 1994.

Lee R. Vandervelt

Subscribed and sworn to before me this 19th day of June, 1995

Diane Swanson

Notary Public, Kenosha County, Wisconsin
My commission expires: October 31, 1996

(Seal)